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## CITATIONS


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713037—46——1

# In the Supreme Court of the United States

OCTOBER TERM, 1946

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No. 342

DANIEL BIRMELI DINGMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the circuit court of appeals (R. 24–29) has not yet been reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered June 4, 1946 (R. 29). On July 3, 1946, the time for filing a petition for a writ of certiorari was extended to August 1, 1946, by order of Mr. Justice Reed (R. 31). The petition was filed August 1, 1946. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (a) (2) and 45 (a), F. R. Crim. P.

### QUESTION PRESENTED

Whether, under the Selective Training and Service Act of 1940 and the statutes extending the periods of service thereunder, a person classified IV–E as a conscientious objector can be required to serve in civilian work of national importance for a period in excess of one year.

### STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Selective Training and Service Act of 1940, the Service Extension Act of 1941, the Territorial Use of Army and Extension of Service Act, and the executive order and Selective Service regulations promulgated thereunder, are set out in the Appendix, *infra,* pp. 12–16.

### STATEMENT

A one-count indictment was returned in the District Court for the Northern District of California on August 6, 1945, charging that on July 22, 1945, petitioner, who had theretofore been classified IV–E [conscientious objector opposed to combatant and noncombatant military service] and assigned to a civilian public service camp for work of national importance, did knowingly, will-

fully, and feloniously absent himself without authority from the camp, in violation of the Selective Training and Service Act of 1940, as amended (R. 2–3). Petitioner, appearing *in propria persona* (R. 9, 10, 13), demurred to the indictment (R. 4–9) on the grounds (1) that the establishment of civilian public service camps for conscientious objectors was not authorized by the Selective Training and Service Act or any other law and was merely a gratuitous assumption of power by the Director of the Selective Service System, and (2) that he had already served at such camps for the full period of one year, "which is the maximum period of service that can be inferred reasonably from the said Act to be required of him" (R. 6). The demurrer was overruled (R. 10), and after a trial by jury (R. 10–11) petitioner was convicted (R. 11). His motion for arrest of judgment, on the ground that the indictment did not state an offense, was overruled (R. 11–12, 16), and he was sentenced to imprisonment for three years (R. 12, 13–14). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the conviction was affirmed (R. 29).

The undisputed facts in support of the conviction are briefly as follows:

Petitioner was classified IV–E by his local board and thereafter, on June 24, 1943, he was ordered to report for work of national importance. Pursuant to this order, he reported to

Civilian Public Service Camp No. 32, at West Campton, New Hampshire, on July 9, 1943. (See order to Report for Work of National Importance, Gov. Ex. 1.[1]) Thereafter petitioner was transferred to a series of camps, terminating in his assignment to Camp No. 148, from which he absented himself without authority on July 22, 1945, as charged in the indictment (see Order of Transfer, Gov. Ex. 2; see also R. 6). Thus it appears that petitioner served in public service camps for approximately two years.

## ARGUMENT

The only contention made by petitioner here is that under the Selective Training and Service Act of 1940 and the statutes extending the periods of service under that Act, conscientious objectors cannot be required to perform work of national importance for a period in excess of twelve months and that, therefore, his unauthorized absence after he had worked as assigned for more than that period was not unlawful. The validity of this contention depends in turn upon the validity of Selective Service Regulation 652.14 (see pp. 15–16, *infra*), which provides that a registrant

[1] Government Exhibits 1 and 2 were introduced at the trial (R. 11) but not incorporated in the record on appeal (see R. 18–19). By stipulation of August 7, 1946 (R. 32), counsel agreed that these exhibits, which have been filed with the Clerk, may be considered as part of the record before this Court.

classified IV–E and assigned to a camp shall be engaged in work of national importance for the duration of the war and six months thereafter, unless sooner released by the Director of Selective Service. That term of service is the same as is required in respect of registrants who are drafted into the armed forces (see pp. 6–7, *infra*). Petitioner admittedly had not served for the period required by the Regulation, nor had he been released by the Director of Selective Service.

Contrary to petitioner's contention, the challenged regulation adheres to the legislative policy expressed in the Selective Training and Service Act of 1940 and the amendments upon which petitioner relies. Section 3 (a) of the 1940 Act declares that "except as otherwise provided in this Act," every male citizen and resident of the United States within specified age limits is "liable for training and service in the land or naval forces of the United States" and authorizes the President "to select and induct" men into such forces. Section 3 (b) provided that each man "inducted under the provisions of subsection (a) shall serve for a training and service period of twelve consecutive months, unless sooner discharged, except that whenever the Congress has declared that the national interest is imperiled, such twelve-month period may be extended by the President to such time as may be necessary in the interests of national defense." Section 5 (g) provides an

exemption from military service for those who are found to be conscientiously opposed to participation in combatant or noncombatant service, but requires that such registrants shall, "in lieu of such induction, be assigned to work of national importance under civilian direction." (*Infra,* pp. 12–13.) On August 18, 1941, Congress enacted the Service Extension Act of 1941 declaring that the national interest was imperiled and authorizing the President in Section 2 (*infra,* pp. 13–14) "to extend, for such periods of time as may be necessary in the interests of national defense [but not to exceed eighteen months], the periods of service, training and service * * * of any or all persons inducted for training and service under" the Selective Training and Service Act and of other designated classes of persons subject to active military service. On August 21, 1941, by Executive Order No. 8862 (*infra,* pp. 14–15), the President extended the period "of training and service of all persons inducted for training and service" under the Act to eighteen months. Following the declaration of war, Congress by the Act of December 13, 1941 (*infra,* p. 15), provided that "the periods of service, training and service, * * * of all members of the Army of the United States now or hereafter in or subject to active military service * * * are extended for" the war and six months following its termination. On December 20, 1941, Congress enacted

a similar provision covering persons inducted into the naval forces (c. 602, § 8, 55 Stat. 846). On December 24, 1941, the Director of Selective Service promulgated Section 652.14 of the Selective Service Regulations (*supra,* pp. 4–5) prescribing a like period of service for conscientious objectors drafted to perform work of national importance.

Petitioner argues that the extension acts of August and December 1941, which refer, respectively, only to persons "inducted for training and service" under the Selective Training and Service Act and to persons "subject to active military service," did not authorize in respect of conscientious objectors any extension of the twelve-month period of service provided in Section 3 (b) of the original act. We think it is evident, however, from a critical analysis of all the Selective Service legislation involved here that all persons drafted under the Selective Training and Service Act are subject to serve for the duration of the war and six months thereafter. The mandate in Section 5 (g) that conscientious objectors shall be assigned to work of national importance "in lieu of such induction" obviously means that they are to serve in such work as an alternative for the military training and service they would otherwise be required to undergo.

Conscientious objectors opposed to both combatant and noncombatant military service are not

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exempted from service. They are subject to the draft the same as others having no conscientious scruples against military service, the only difference being that Congress accorded them the privilege of performing their service in work deemed of national importance "in lieu of" military service. Cf. *Roodenko* v. *United States,* 147 F. 2d 752, 754 (C. C. A. 10), certiorari denied, 324 U. S. 860. While this concession may have been required by the legislative determination to accede to the personal convictions of conscientious objectors, that factor did not make it necessary or appropriate to require less service of these persons than is required of other draftees. It is reasonable to conclude, therefore—particularly in the absence of any persuasive evidence to the contrary—that Congress, having provided for the drafting of conscientious objectors under like conditions as provided for other persons, except as to the type of service to be performed, intended to require them to serve for the same period of time as persons drafted into the armed forces. To conclude otherwise would attribute to Congress an intention to create a draft system which unjustly and without logical basis would require one class of draftees to serve for far longer periods of time than another. This was the view of the Director of Selective Service, for he explained his action in promulgating Regulation 652.14 as follows:

> In keeping with the original Selective Service Act, it was expected that assignees would serve one year in camp and then be released. However, congressional action extended the term of service for men in the Army. It was interpreted to apply to assignees as well, so that their term of duty was increased to 18 months. Similarly, when the Army released men over 28 years old, the Camp Operations Division did the same. The general rule has been to follow Army policy in matters of this kind as closely as possible, not because the assignees were considered to have a military status, but with the idea of making the conditions of their service comparable wherever this could be done. It was felt that assignees should be neither favored, nor punished because of their beliefs, but as far as the law allowed, they should undergo the same inconveniences and receive the same benefits as the men in service.[2]

It is significant that in several successive sessions after the promulgation of this Regulation Congress appropriated funds for the operation and management of the civilian public service camps without questioning its propriety. See, e. g., 50 U. S. C. App., Supp. V, 309a.

The fallacy of petitioner's argument lies in his failure to recognize that the language of the two extension acts of 1941, upon which he relies, is

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[2] First Report of the Director of Selective Service, 1940–1941, *Selective Service in Peacetime* (1942), p. 200.

substantially the same as that employed in Section 3 (b) of the original act, which he assumes applied to conscientious objectors (see Pet. 3, 6, 8). But Section 3 (b), like the extension acts, refers only to persons "inducted" under the provisions of Section 3 (a) into the land and naval forces. And, as we have demonstrated (*supra*, pp. 7–8), Section 5 (g), requiring service in work of national importance "in lieu of such induction," when read in context with Section 3 (b), clearly implies a policy that conscientious objectors might be required to serve for a period of twelve months unless sooner discharged. The extension acts merely amended Section 3 (b) by enlarging the periods of service which might be required of registrants drafted under the Selective Training and Service Act, and did not purport to alter the policy of the Act requiring conscientious objectors to perform an equivalent service.

Petitioner's argument is thus based upon an untenable distinction between the applicable statutes. If, as he has no difficulty assuming, Section 3 (b) of the original act applied to limit the required service period of conscientious objectors to twelve months, then the two extension acts of 1941 similarly applied and were authority for the promulgation of Regulation 652.14. If, on the other hand, the extension acts are to be read literally, as petitioner urges, so as not to apply to such persons, Section 3 (b) must be sim-

ilarly construed. In the latter event, there was no controlling legislative provision and the matter was properly one for the determination of the Director of Selective Service acting in accordance with the general policy laid down by Congress. That policy, as we have already noted, was followed in the promulgation of the Regulation, and it has likewise been followed in respect of the release of conscientious objectors.[3]

### CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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*Solicitor General.*
THERON L. CAUDLE,
*Assistant Attorney General.*
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
*Attorneys.*

SEPTEMBER 1946.

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[3] The Camp Operations Division of the Selective Service System has adopted a plan for the discharge of men from CPS camps similar to that for the demobilization of Army personnel. This plan has been effectuated by a series of directives to all CPS camps and institutions, the first of which was issued on or about October 18, 1945. Each of these directives sets forth the release procedures and qualifications to be employed and each in turn follows the standards for discharge then prevailing for the Army. The directive of June 24, 1946, is illustrative and is printed in the Appendix, *infra*, pp. 16–19.

## APPENDIX

The Selective Training and Service Act of 1940 (Act of September 16, 1940, c. 720, 54 Stat. 885), as amended, provides in pertinent part:

> SEC. 3 (a) (50 U. S. C. App., Supp. V, 303 (a)). Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States * * *. The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest * * *.
>
> (b) (50 U. S. C. App. 303 (b)). Each man inducted under the provisions of subsection (a) shall serve for a training and service period of twelve consecutive months, unless sooner discharged, except that whenever the Congress has declared that the national interest is imperiled, such twelve-month period may be extended by the President to such time as may be necessary in the interests of national defense.
>
> SEC. 5 (g) (50 U. S. C. App. 305 (g)). Nothing contained in this Act shall be construed to require any person to be

> subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. * * *

The Service Extension Act of 1941 (Joint Resolution of August 18, 1941, c. 362, 55 Stat. 626, 50 U. S. C. App., Supp. V, 351, 352), provided in pertinent part:

> SEC. 1. * * * the Congress, acting in accordance with and solely for the purpose of carrying into effect the provisions of section 3 (b) of the Selective Training and Service Act of 1940, hereby declares that the national interest is imperiled.
>
> SEC. 2. The President is hereby authorized, subject, however, to the condition hereinafter stated, to extend, for such periods of time as may be necessary in the interests of national defense, the periods of service, training and service, enlistment, appointment, or commission, of any or all persons inducted for training and service under said Act, members and units of the reserve components of the Army of the United States (including the National Guard of the United States), retired personnel and en-

listed men of the Regular Army, and any other members of the Army, who are now, or who may hereafter be, in or subject to active military service, or training and service: *Provided,* That extension of the periods of active military service, or training and service, in the case of any person subject to the provisions of this section, shall not, without his consent, exceed eighteen months in the aggregate; except that whenever the Congress declares that it is in the interests of national defense to further extend such periods of active military service and training and service, such periods may be further extended by the President, in the case of any such persons, for such time as may be necessary in the interests of national defense: *Provided further,* That the authority hereby conferred is subject to the condition that the delegation of such authority may be revoked at any time by concurrent resolution of the Congress.

Executive Order No. 8862 of August 21, 1941 (6 F. R. 4319), provided in part:

By virtue of the authority conferred upon me by section 2 of the Service Extension Act of 1941 (Public Law 213, 77th Congress), approved August 18, 1941, and as Commander-in-Chief of the Army and Navy of the United States, it is ordered as follows:

1. The periods of training and service of all persons inducted for training and service under the provisions of the Selective Training and Service Act of 1940, as amended, who are now, or who may hereafter be, in such training and service are hereby extended for a period of eighteen

months, unless such persons are sooner discharged. * * *

The Territorial Use of Army and Extension of Service Period Act (Act of December 13, 1941, c. 571, 55 Stat. 799; 50 U. S. C. App., Supp. V, 731, 732) provides in pertinent part:

> SEC. 1. * * * the provisions of Public Resolution Numbered 96, Seventy-sixth Congress, approved August 27, 1940, as amended, and of Public, Numbered 783, Seventy-sixth Congress (the Selective Training and Service Act of 1940), as amended, insofar as they restrict the territorial use of units and members of the Army of the United States, are suspended during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war.
>
> SEC. 2. The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section: *Provided,* That nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case.

Selective Service Regulation 652.14, effective February 1, 1942 (7 F. R. 112), provides in pertinent part:

> *Period of service.*—(a) A registrant in Class IV–E who has been assigned to a camp shall be engaged in work of national

importance under civilian direction during the existence of any war in which the United States is engaged and during the six months immediately following the termination of any such war, unless sooner released under the same conditions as pertain in the armed forces.[4]

The June 24, 1946, directive of National Headquarters of the Selective Service System concerning the release of conscientious objectors read as follows:

JUNE 24, 1946.

*To all Camps and Institutions Using Conscientious Objectors:*

Subject: Plan for Discharge of Men from CPS Camps.

1. Beginning July 1, 1946 application may be made for discharge by the following classes of conscientious objectors assigned to work of national importance. Applications for discharge will contain specific information as to whether the assignees desire transportation or not. If transportation is requested, information as to the railheads or bus stations, between which the travel is desired, will be included along with the physical examination, DSS Form 222, completed on or after July 1, 1946.

a. Those who will have reached their 38th birthday on or before July 31, 1946.

b. Those who will have reached their 35th birthday and will have completed two (2) years of service on or before July 31, 1946.

c. Any assignee who is the natural father

[4] The regulation was amended effective July 23, 1945 (10 F. R. 9214) by striking all after the word "released" and substituting therefor "by the Director of Selective Service."

of three (3) or more children under 18 years of age who are dependent upon him for support. (See Paragraph 3.)

d. Those who have completed twenty-four (24) months of service on or before June 30, 1946.

e. Any assignee who has completed eighteen (18) months of service on or before June 30, 1946 and who is the natural father of two (2) children under 18 years of age who are dependent upon him for support. (See Paragraph 3.)

f. Any assignee who has completed twenty-one (21) months of service on or before June 30, 1946 and who is the natural father of one (1) child under 18 years of age who is dependent upon him for support. (See Paragraph 3.)

2. Applications for discharge in the following categories should be submitted through the regular channels and will be processed on an individual basis through the Separation Board.

a. Applications for discharge on the grounds of unusual hardship.

b. Applications for discharge on the grounds it is in the national health, safety or interest.

c. Applications for discharge on the grounds of physical disability.

d. Applications for discharge of any assignee who has three (3) or more dependents under 18 years of age who occupy a status similar to that of natural children to the assignee. (See Paragraph 3.)

e. Application for discharge of any assignee who has completed eighteen (18) months of service on or before June 30, 1946 and who has two (2) dependents under 18 years of age who occupy a status similar

to that of natural children to the assignee. (See Paragraph 3.)

f. Application for discharge of any assignee who has completed twenty-one (21) months of service on or before June 30, 1946 and who has one dependent under 18 years of age who occupies a status similar to that of a natural child to the assignee. (See Paragraph 3.)

Applications submitted under "a" and "b" above must be supported by substantiating evidence giving names and addresses of all persons concerned, statements of medical officers and others familiar with all facts.

Applications submitted under "c" above should be accompanied by a recent physical examination of the assignee on D. S. S. Form 222. Other applicants under this paragraph need not submit physical examinations until called for. Each application should show railheads or bus stations between which transportation is desired upon discharge.

3. Applications for discharge under Paragraph 1 (c), (e) and (f) and Paragraph 2 (d), (e) and (f) will contain the following information:

a. Full name of mother of children.

b. Date of marriage of assignee and mother of children.

c. Full name and date of birth of each child.

d. Present location of dependents.

4. Applications for discharge will be accompanied by a certificate from the Camp Director to the effect that the applicant has not participated in any refusal to work since April 15, 1946.

In the event that the above certificate cannot be made a detailed statement will be submitted by the concerned Camp Director giving dates, offense, etc.

5. Care should be exercised to see that all data called for is submitted, otherwise application will be returned for correction and thus delay discharge. Applications and physical examinations dated prior to dates specified in this directive will be returned without action.

For The Director,

LEWIS F. KOSCH,
*Colonel, Field Artillery,*
*Assistant Director—Camp Operations.*

U. S. GOVERNMENT PRINTING OFFICE: 1946